Taft Coal Company *and* United Mine Workers of America. Case 10–CA–28288

June 28, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On January 30, 1996, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that Taft Coal Company, Oakman, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition and refusing, on request, to recognize and bargain in good faith with United Mine Workers of America as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by the Respondent at its Oakman, Alabama facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing the employees' terms and conditions of employment by discontinuing to make contractually agreed pension benefit payments for unit employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Remit the delinquent pension contributions, including any additional amounts due the fund, and reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required payments since February 1995, in the manner set forth in footnote 2 of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Oakman, Alabama, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We shall also modify the judge's recommended remedy to require that the Respondent make whole unit employees for its failure to make contractually required pension contributions by making all delinquent contributions, including any additional amounts due the fund in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse the employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, to the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

employees and former employees employed by the Respondent at any time since February 2, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition and refuse to recognize United Mine Workers of America as the exclusive collective-bargaining representative of the following appropriate bargaining unit:

> All production and maintenance employees employed by us at our Oakman, Alabama facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT discontinue making pension contributions for unit employees after withdrawing recognition from the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request by the Union, recognize and bargain with United Mine Workers of America as the exclusive collective-bargaining representative of our employees in the above bargaining unit.

WE WILL restore all pension contributions not made for unit employees since February 1995, and WE WILL reinstate our practice of regularly making pension contributions for unit employees.

WE WILL reimburse any of our employees, with interest, who suffered any losses or incurred extra expenses due to our failure to make the pension contributions since February 1995.

TAFT COAL COMPANY

Karen Neilsen, Esq., for General Counsel.
Sydney Frazier, Esq., of Birmingham, Alabama, for the Respondent.
Graham Sisson, Esq., of Birmingham, Alabama, for the Charging Party (the Union).

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Birmingham, Alabama, on October 13, 1995. The formal documents received in evidence showed that the charge was filed on February 2, 1995. The complaint issued June 16, 1995.

Respondent, the Union, and the General Counsel were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by all parties, I make the following

FINDINGS OF FACT

Respondent admitted that it is a Alabama corporation with a place of business in Oakman, Alabama, where it is engaged in the business of mining and processing coal; that during the past calendar year it sold from its Oakman, Alabama facility goods valued in excess of $50,000 directly to Alabama Power Company, an Alabama public utility company that in turn annually purchases and receives, in interstate commerce, goods and supplies valued in excess of $50,000 directly from sources outside Alabama; and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act).

Respondent admitted that the Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

I. THE UNFAIR LABOR PRACTICE ALLEGATIONS

Section 8(a)(5): Refusal to Recognize and Bargain

The complaint alleges that Respondent unlawfully withdrew recognition and has refused to bargain with the Union since February 2, 1995. At the hearing the General Counsel amended the complaint to include an allegation that Respondent unilaterally ceased making pension contributions in or about February 1995.

II. THE RECORD EVIDENCE

Respondent admitted that in the past the Union has represented its employees and has entered into collective-bargaining agreements with it, but alleges that the Union has abandoned its collective-bargaining role for the employees.

The parties stipulated that the Union has represented Respondent's employees in the following bargaining unit since at least March 14, 1950:

> All production and maintenance employees employed by the Respondent at its Oakman, Alabama facility, but

excluding all office clerical employees, guards and supervisors as defined in the Act.

The parties stipulated that Respondent and Mine Workers Local 1956 were signatories to an agreement that was identical to the National Bituminous Coal Wage Agreement of 1988 that extended from February 1, 1988, to February 2, 1993. Under that agreement Respondent was obligated to make pension contributions on behalf of its unit employees. The parties have not entered into any agreement subsequent to February 2, 1993. On February 2, 1995, there were only two employees in the bargaining unit. In February 1995, Respondent ceased making pension contributions for the unit employees.

A. *November 23, 1992*

The Union wrote Respondent of its intention to terminate the collective-bargaining agreement effective 10:01 a.m., February 2, 1993, and that it was prepared to meet with Respondent for the purpose of engaging in negotiations. Included in the Union's letter was an 11-page request for information.

B. *January 22, 1993*

Respondent answered the Union's November 23 letter on January 23; advised the Union that it produces coal by surface mining methods and provided a five-page response to the Union's request for information.

C. *February 18, 1993*

The Union wrote Respondent and asked for agreeable times and locations for bargaining sessions.

D. *February 23, 1993*

Respondent wrote the Union (certified mail) and suggested several dates and a proposed site for negotiations.

E. *March 11, 1993*

The Union wrote Respondent and acknowledged Respondent's February 23, 1993 letter. The Union asserted that Respondent had not fully responded to its November 13, 1992 request for information stating that it could ''mutually arrange a productive meeting after receipt of all the information requested from Respondent.''

F. *May 11, 1993*

The Union wrote Respondent that Respondent had not replied to the Union's request for bargaining information of November 13, 1992, and March 11, 1993. The Union again requested the information.

G. *October 18, 1993*

The Union wrote Respondent regarding a grievance and added the following:

> Also, we have not received any reply to our ''Request for Bargaining Information and are waiting for this information to be provided.''

H. *December 1993*

Daryl Dewberry has been International executive board Member of District 20 of the Union since November 10, 1993. For 8 years before November 1993, he was District executive board member. As District executive board member, he was assigned to represent the Union in administrating the contract at Taft Coal.

After becoming International executive board member, Dewberry contacted Jimmy Alexander at Taft Coal in December 1993. Alexander was the human resources director at Taft Coal. Dewberry told Alexander that he would be handling the contract negotiations with Taft Coal and he asked Alexander for some dates they could negotiate toward a contract. Alexander told Dewberry that he would get back with some tentative dates.

I. *February 1994*

Daryl Dewberry contacted Jimmy Alexander again around February 9, 1994. Dewberry had heard nothing from Alexander in response to his December 1993 request for dates for negotiations. Again, Alexander responded that he would get back to Dewberry with some tentative dates.

J. *March 9, 1994*

Jimmy Alexander admitted that Daryl Dewberry phoned him on March 9 and asked for negotiation dates. Alexander did not recall that Dewberry had phoned him about negotiation dates before March 9. Dewberry did not phone again regarding negotiations during 1994.

Alexander tried unsuccessfully to phone Dewberry on March 25 and 30, 1994, to give him possible negotiation dates. Alexander left word at Dewberry's office on both of those occasions but Dewberry did not return either call. Alexander did not try to contact Dewberry after those dates.

K. *April 1994*

Daryl Dewberry phoned Jimmy Alexander regarding a complaint he received that Taft Coal was contracting out unit work. Dewberry talked about that matter and he also asked Jimmy Alexander ''we need to sit down and negotiate a contract.'' Alexander replied that he would get with his people and also told Dewberry that more than likely Eller and Associates would be handling the contracting out grievance.

Alexander denied that Dewberry asked about negotiation dates after March 9 and before January 1995.

L. *May 2 and 3, 1994*

The Union wrote Respondent that it had received information that Respondent was contracting out work in violation of provisions of the 1988 National Bituminous Coal Wage Agreement. The Union advised that the letter constituted step 1 of the grievance procedure. The Union's letter continued:

> We look forward to bargaining a successor agreement in good faith while the employees continue to work under the terms and conditions of the 1988 National Bituminous Coal Wage Agreement.
>
> Please notify me as soon as possible of your agreeable times and locations for bargaining sessions.

Daryl Dewberry testified that he discussed the grievance with Eller and Associates and they took the position that Respondent had complied with the contract by sending out letters to the employees affording them recall. The Union did not take the matter to the second grievance step.

The Union also advised Respondent on May 3, that it had received information that Respondent was involved in an additional violation of the terms of the 1988 wage agreement and advised that the letter constituted step 1 of that grievance.

After investigating the matter, the Union permitted the grievance to die.

M. *May 23, 1994*

During the hearing Daryl Dewberry was shown a letter addressed to him from Kenneth R. Eller regarding Respondent's position that it had complied with the expired contract as to contracting out work. The letter included a proposal of several optional dates for negotiations. Dewberry denied that he received that letter from Eller.

N. *January 1995*

Jimmy Alexander testified that he was phoned by Daryl Dewberry in January 1995. Dewberry asked about possible negotiation dates. Alexander testified there had been a corporate restructuring and he told Dewberry that he was no longer employed by Taft Coal and that Dewberry would need to contact Ken Eller who was representing Taft.

Alexander testified that although he is employed by Taft Coal Sales and Associates, Inc., he was directly employed by Taft Coal in administration of the union contract until December 31, 1994.

O. *January 24, 1995*

The Union wrote Respondent:

> Pursuant to our telephone conversation today, this is to advise you that our records do not include receipt of any prior notification from your Company outlining tentative dates for contract negotiations.
>
> The Union will accept any dates that you propose for contract negotiations; therefore, we await your immediate response.
>
> Please feel free to contact either myself, Mike Clements, Eddie Horton or Gary Pickett to discuss this matter further.

Daryl Dewberry testified that he had not received any notification from Respondent as to dates for negotiations when he wrote the above letter.

P. *February 2, 1995*

Respondent wrote the Union, stating:

> I do not believe that you continue to represent the employees of A. J. Taft Coal Co., Inc. and therefore I respectfully decline your invitation to meet and bargain.

After receiving the above letter, the Union checked and was told by the two employees in the bargaining unit that they wanted the Union to continue to represent them. Both employees are union members in good standing.

Q. *February 15, 1995*

The Union wrote Respondent that it continued to represent and had not abandoned the employees. The Union asked for a completed information packet pursuant to earlier letters it had sent Respondent, and for tentative bargaining dates.

R. *February 27, 1995*

Respondent, through President Charles K. McCoy, replied to the Union, stating Respondent's position remained as expressed in its February 2, 1995 letter. He declined the Union's request to meet and bargain.

III. FINDINGS

A. *Credibility Determinations*

There are two credibility disputes of significance. Daryl Dewberry in dispute with Jimmy Alexander testified that he phoned Alexander on four occasions beginning in December 1993 and requested optional negotiation dates. Alexander testified that Dewberry phoned and asked for negotiation dates on only two occasions. One of those occasions was on March 9, 1994, and the other occurred during January 1995.

Both Alexander and Dewberry demonstrated good demeanor. I am impressed with the documentation by Alexander of the March 9 telephone conversation. However, I am concerned with the overall record regarding Alexander's testimony. According to Alexander he phoned after Dewberry asked about negotiation dates and left word for Dewberry to return his calls on March 25 and 30, 1994. Alexander was prepared to give Dewberry some optional negotiating dates. According to Alexander, Dewberry never returned those calls. However, Alexander did not deny Dewberry's testimony that Dewberry phoned Alexander in April 1994 about a grievance he had received that Respondent was contracting out unit work. Dewberry testified that additionally he told Alexander, ''[W]e need to sit down and negotiate a contract.''

Even if I credit Alexander's testimony that he did not discuss negotiations on that occasion, it is difficult to understand why he did not tell Dewberry about the negotiation dates he planned to propose when he tried to phone Dewberry on March 25 and 30, 1994. I find it difficult to understand why, if Alexander was trying to reach Dewberry and give him negotiation dates on March 30, he failed to give Dewberry that information when Dewberry phoned within a month of March 30, 1994.

In view of the full record I credit Dewberry's testimony that he contacted Alexander requesting negotiation dates on four occasions. However, I am willing to consider for the sake of examination whether a violation occurred, that Alexander only discussed negotiation dates over the phone with Dewberry on March 9, 1994, and during January 1995. Nevertheless, even with that assumption, I am convinced that even though Alexander testified that he phoned and left word for Dewberry to return his calls on March 25 and 30, Alexander failed to respond to Dewberry's March 9 request for negotiation dates and he had opportunities to do so including one opportunity during his and Dewberry's April 1994, phone conversation regarding the contracting out grievance. For that reason I cannot credit Alexander's testimony to the extent it may show that Respondent did everything it could

within reason, to supply the Union with requested dates for negotiation sessions. I find instead that Alexander failed to supply Dewberry with those requested dates during March and when they talked in April 1994.

There is also a dispute as to whether the Union received a May 23, 1994 letter from Kenneth Eller. Daryl Dewberry and Mike Clements denied that the Union received that letter. In consideration of that dispute, I find it surprising that an experienced person like Kenneth Eller failed to document receipt of that letter by return receipt. In any event whether the letter was mailed or not, I am convinced and credit that the Union never received the letter.

B. *Factual Determinations*

In view of the full record and my credibility findings, I find that the record supports the above stated findings of fact except as follows.

I find that the Union did not receive a letter purportedly written by Kenneth Eller on behalf of Respondent, on May 23, 1994. The Union did not learn through that letter that Respondent proposed several negotiation dates. Instead, I find that Respondent failed to supply the Union with optional negotiation dates at any time after the Union's March 11, 1994 request for a complete response to its November 13, 1993 request for information. Moreover, the credited record shows that Respondent did not fully respond to the Union's November 13, 1993, and March 11, 1994, request for information.

In that regard, the record does show that Respondent's January 1993 response to the Union's November 23, 1993 request for information was incomplete. Respondent contended that many of the questions were unanswered because they sought information relating to the mining of coal which Taft had not performed with unit employees since 1991, and other questions were unanswered because the information was not readily available.

With those points in mind, I find that the record reflects that Respondent failed to pursue good faith negotiations by (1) failing to fully respond to the Union's request for information; and (2) failing to supply the Union with dates on which it was agreeable to meet and negotiate a new contract.

The record evidence is not in dispute regarding statements by bargaining unit employees. Respondent president Charles McCoy testified without rebuttal that the two unit employees told him late in 1994, that they felt like the Union had abandoned them, that they had not had a raise in 5 years and they felt like just suing the District (the Union).

The record is not in dispute as to comments the two unit employees made to the Union following Respondent's withdrawal of recognition. Mike Clements, union representative, testified that after Respondent withdrew recognition on February 2, 1995, he met with the only two unit employees and showed them Respondent's letter withdrawing recognition. Clements testified without rebuttal that the unit employees ''let me know quick that they were paying (Union) dues and yes, the Union represented them.''

C. *Legal Determinations*

As shown above, Respondent and the Union have a history of collective bargaining. On November 23, 1992, the Union notified the Respondent of its intent to terminate their collective-bargaining agreement at its termination date of February 2, 1993, and to negotiate a new bargaining agreement. The law is clear that under the circumstances shown in the above factual findings there is a presumption that the Union continues to represent unit employees after the February 2, 1993 expiration of the collective-bargaining agreement. A presumption following the expiration of a collective-bargaining contract, is rebuttable. *Celanese Corp*., 95 NLRB 664, 672 (1951); *Hajoca Corp*., 291 NLRB 104 (1988); and *Curtin Matheson Scientific*, 287 NLRB 350 (1987), enfd. denied 859 F.2d 362 (5th Cir. 1988), revd. 494 U.S. 775 (1990), remanded 905 F.2d 871 (5th Cir. 1990).

Respondent contends that it did rebut the presumption of continued majority support. Jurisprudence has established that an employer may rebut that presumption by (1) proving that the union has actually lost its majority status; or (2) proving that the employer had a good-faith belief based on objective considerations that the union had lost its majority in a context free of employer unfair labor practices. *Curtin Matheson Scientific*, supra; and *Celanese Corp*., supra. Whether the evidence demonstrates a sufficient basis to doubt the union's status must be determined in light of the totality of the circumstances. *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428 (10th Cir. 1990)

Here, there was no showing that the Union actually lost its majority status.

Instead, Respondent argues under the second option that it had a good-faith belief based on objective considerations that the Union had lost its majority in a context free of employer unfair labor practices.

As to whether Respondent withdrew recognition in a context of unfair labor practices, the credited record did show that Respondent failed to engage in good-faith negotiations with the Union in 1994 and 1995 when it failed to fully supply the Union with information requested for collective-bargaining purposes and when it failed to respond to the Union's numerous requests for negotiation dates.

Moreover, the record shows that Respondent failed to prove that it had a good-faith belief based on objective considerations that the Union had lost its majority.

President McCoy testified that he withdrew recognition of the Union on February 2, 1995: (1) because since he became president on June 1, 1994, there had been no activity from the Union; (2) because the unit employees had told him in late 1994 that they felt like they had been abandoned by the Union, they had not received a raise in 5 years and they felt like they ought to sue the Union; and (3) on advise of counsel.

As to McCoy's claim there had been no union action after June 1, 1994, the record is undisputed that Daryl Dewberry spoke to Jimmy Alexander in January 1995. Dewberry asked Alexander about scheduling negotiation dates. Alexander replied that he was no longer with Taft due to corporate restructuring and that Dewberry should contact Ken Eller. On January 24, 1995, the Union wrote Respondent that the Union would accept any dates proposed by Respondent for contract negotiations.

In view of the record and contrary to McCoy's recollection, the Union contacted Respondent within the month before Respondent withdrew recognition. Before those contacts there had been a hiatus of some 7 months between the Union filing two first step grievances in May 1994 and the January 1995 events. The Board has, on occasion, considered a pe-

riod of inactivity by the Union in determining whether the employer had a good-faith doubt of the Union's continued majority. *Southern Wipers*, 192 NLRB 816 (1971). However, the Board has also held that a hiatus similar to that here, does not justify withdrawal of recognition. *King Soopers*, 295 NLRB 35 (1989); *Cowles Publishing Co*., 280 NLRB 903 (1986); and *Pennex Aluminum Corp*., 288 NLRB 439 (1988), enfd. 869 F.2d 590 (3d Cir. 1989).

The Board has been reluctant to find that a break in negotiations supports a good-faith doubt when that break is explained by factors other than loss of employee support. *Pennex Aluminum Corp*., supra at 441. Here, as shown above, the evidence shows that the Respondent failed to supply the Union with all requested information and that factor may have contributed to the hiatus in union action during 1994. There was no showing that the hiatus was caused by loss of employee support. An employer's actions which ''improperly affect the bargaining relationship itself,'' may show bad faith on the part of the employer. *Hotel & Restuarant Employees Local 19 (Burger Pits) v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1985).

Respondent also argued that the Union generally neglected the unit by a lackluster handling of grievances. However, the record showed that the Union discussed grievances that came to its attention with Respondent's representative and checked on the accuracy of Respondent's position with some of the involved employees. The employees contacted by the Union agreed with Respondent that they had been offered recall to work. For that reason the Union did not pursue the grievances. As to the one other grievance that was shown to have come up and mentioned in the Union's October 18, 1993 letter to Respondent, the Union stated it would bring that grievance up in negotiations. On the basis of that evidence I find that the record did not prove that the Union was lackluster in handling grievances.

Additionally, the record shows that the Union made several efforts to negotiate a new contract and to otherwise represent unit employees. On November 23, 1992, the Union wrote Respondent that it wanted to engage in contract negotiations. The credited record shows without dispute that the Union contacted Respondent on February 18, March 11, May 11, and October 18, 1993; March 9, April 2, and May 2, 1994; and during January and on January 24, 1995, and asked either for negotiation dates or for information for the purpose of negotiating a new contract. Even though Respondent partially responded on January 22, 1993, to the Union's November 23, 1992 request for information, it never did fully respond to that information request. Kenneth Eller testified for Respondent that the Union was relying on its information request as an excuse for not meeting to negotiate a successor agreement. However, that testimony was not supported by anything more than Eller's belief. The record showed that Respondent did not fully respond to the Union's information request and Respondent never explained to the Union why it had not fully responded. Instead Respondent ignored repeated requests of the Union. The Union contended to Respondent that it needed the requested information to fully prepare for negotiations. Respondent failed to show that the Union's request would not have assisted in negotiations and Respondent failed to answer several request for response from the Union. That evidence illustrated that it was Respondent, rather than the Union, that was uncooperative and that refusal to cooperate appears to have been the only reason why negotiations did not go forward.

Kenneth Eller also testified that on other occasions the Mine Workers Union has negotiated contracts even though the employer has failed to respond to the Union's information request or has only partially responded to the Union's request. Nevertheless, in the instant case the Union did subsequently tell Respondent that it needed a full response and there was no showing that the Union was not justified in that request. I am unable to determine that the Union was using the information request as a delay tool on the basis of Eller's testimony that the Union had, on other occasions, continued negotiations without any or a full response to the Union's information request.

President McCoy's second reason for withdrawing recognition involved his late 1994 conversations with the only two employees in the unit. As shown above, McCoy's testimony that he relied on comments by unit employees made in late 1994 and on advice of counsel, in withdrawing recognition on February 2, 1995, is unrebutted and credited. The employees told McCoy that they felt they had been abandoned by the Union, they had not received a raise in 5 years and they felt like they ought to sue the Union. The evidence is also unrebutted and credited that following withdrawal of recognition, the employees in the unit advised the Union they wanted the Union to continue as their bargaining representative. As shown in *Albany Steel*, 309 NLRB 442, 456 (1992), enfd. conditionally 17 F.3d 564 (2d Cir. 1994), supplemented 314 NLRB 1096 (1994). Nothing which the employer identified as an actual statement of an employee showed that any employee was repudiating the union as his representative, certainly not clearly repudiating. *Phoenix Pipe & Tube*, 302 NLRB 122 (1991), enfd. 955 F.2d 852 (3d Cir. 1991). See also *Suzy Curtains, Inc*., 309 NLRB 1287 (1992), remanded 19 F.3d 11 (4th Cir. 1994), supplement 318 NLRB 391 (1995); and *United Supermarkets v. NLRB*, 862 F.2d 549 (5th Cir. 1989). The employees' comments to McCoy may have illustrated frustration with the Union but neither employee was shown to have said anything to the effect that the Union no longer served as their representative.

I find that the credited evidence failed to show that Respondent had a good-faith belief based on objective considerations the Union had lost its majority on February 2, 1995. Respondent did not rebut the presumption of continued majority support.

The parties stipulated that Respondent ceased making pension contributions which were required under the expired collective-bargaining agreement, on behalf of unit employees, after it withdrew recognition on February 2, 1995. It is established in jurisprudence that a requirement to continue the existing benefit of pension contributions for unit employees survives the expiration of a collective-bargaining agreement and cessation of those contributions constitutes an unfair labor practice. *Natico, Inc*., 302 NLRB 668 (1991); and *White Oak Coal Co*., 295 NLRB 567 (1989). In view of my findings herein that the Union continued to represent the unit employees after February 2, 1995, I find that by unilaterally withholding continued pension contributions for unit employees, Respondent engaged in an additional violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Taft Coal Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by withdrawing recognition and refusing, on request, to recognize and bargain in good faith with United Mine Workers of America as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit and by ceasing to continue pension contributions for unit employees after it withdrew recognition from the Union, engaged in activity violative of Section 8(a)(1) and (5) of the Act:

> All production and maintenance employees employed by the Respondent at its Oakman, Alabama facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully refused to bargain with the Union, I shall order that it recognize the Union and, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

Having found that the Respondent unlawfully changed terms and conditions of employment of unit employees by ceasing to make payments to their pension benefits beginning in February 1995, I shall order the Respondent, on request, to restore withheld pension benefits and restore its practice of paying pension benefits for unit employees.

Respondent is ordered to make the bargaining unit employees whole for all losses in pension benefits which they suffered by Respondent's unlawful action as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]